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No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, *Petitioner*

vs.

W. H. WARDLAW, *Independent Executor of the Estate of C. W. Wardlaw, Deceased, et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANSWER BY RESPONDENT TO REPLY BRIEF OF PETITIONER

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In his Reply Brief, petitioner finally admits that taxpayers in the **Wardlaw** case, like the taxpayer he **Lewis** case, did not have a meaningful choice ply Brief, p.2). This lack of meaningful choice precisely the ground on which the Government, ts brief opposing the petition for a writ in the **erg** case, argued that the **Lewis** case was distin-shable from, and therefore not in conflict with, **erg.** Clearly then, on the very same ground, **Ward-** is distinguishable from, and not in conflict with, **erg.** Hence, review of the **Wardlaw** case by this rt is not necessary.

Petitioner is fully aware that there is no ground for his request that a writ of certiorari be issued in the **Wardlaw** case, since, by his own admission, **Wardlaw** is distinguishable from, and hence not in conflict with, **Ekberg.** Consequently, in the belief that he has a tenable argument that the **Catto** case conflicts with **Ekberg,** petitioner continues his efforts to treat the **Wardlaw** and **Catto** cases as if they were one and the same, even while he (a) admits that the taxpayers in the **Wardlaw** case did not have a meaningful choice because they "could not have changed their method of accounting after 1944", and (b) argues that the taxpayers in **Catto** did have a meaningful choice because they "could have changed their method of accounting in 1948 or 1951, well after a 'meaningful option' was available." (Reply Brief, p.2).

While petitioner obviously does not believe that the **Wardlaw** and **Catto** cases are factually alike, having taken the position that they differ on the vital point of meaningful choice, nevertheless petitioner would have this Court treat the two cases as if they were one and the same simply because a statement in the **Catto** opinion says that the appeal in that case "once again raises the problem of the tax and accounting treatment to be accorded raised breeding cattle which are sold by an accrual basis taxpayer", and that the same "issue is raised" in the **Wardlaw** case. Beyond question, the **Wardlaw** case does involve the problem of the tax treatment to be accorded raised breeding cattle sold by accrual basis farmers, just as the **Lewis** case involved this issue, and the **Ekberg** case, and the **Little** case; but finding that two cases involve the same general issue is no support whatever

for the argument that the two cases should be treated as if they were one and the same, so that if **Catto** should conflict with **Ekberg**, then **Wardlaw** would therefore conflict. By this sort of reasoning, it would be necessary to conclude that the **Lewis** case is exactly like the **Ekberg** case, because they both involve the same issue, but, as the petitioner himself has pointed out, these two cases are distinguishable and therefore could not possibly be treated as one and the same, because in one case the taxpayer had a meaningful choice and in the other he did not. For precisely the same reason, the **Wardlaw** and **Catto** cases cannot be treated as if they were one and the same: by petitioner's own admission, the taxpayers in the **Wardlaw** case did not have a meaningful choice and, by petitioner's own contention, the taxpayers in the **Catto** case did.

Petitioner originated, and used successfully before this Court, the argument that a case could not conflict with **Ekberg** if the taxpayer involved did not have a meaningful choice. For this reason there was no conflict between **Lewis** and **Ekberg**. For the same reason, there is no conflict between **Wardlaw** and **Ekberg**. In the **Catto** case, the trial Court held that the taxpayers there did not have a meaningful choice; hence, there is no conflict between **Catto** and **Ekberg**. The only argument petitioner has is in the **Catto** case, and his argument there is very limited: He cannot deny that the trial Court ruled that the taxpayers did not have a meaningful choice; he can only argue that the Court used the wrong cut-off date in deciding when a choice becomes meaningful. (See Wardlaw Br. in Opp., p.14, Fn. 17). Clearly, this is a very narrow point on which

to rest a petition for review by the Supreme Court of the United States.

Petitioner next says that "It is clear that the Fifth Circuit rested its decisions in the instant cases on the dichotomy between cash and accrual basis ranchers", and not upon whether a rancher had a meaningful choice. (Reply Brief, p.2). Surely this argument is not advanced seriously, because the Court of Appeals in each of these two cases clearly stated that it was following the **Lewis** case, which, as petitioner himself pointed out when he opposed the issuance of a writ in the **Ekberg** case, **was decided on the ground of a lack of meaningful choice.** Petitioner's present argument places him in the ridiculous position of contending either (a) that the instant cases are not based on **Lewis,** or (b) that the **Lewis** case really turned on the dichotomy between cash and accrual basis ranchers, and not on the question of meaningful choice, and that four years ago he asked this Court to distinguish the **Lewis** case on the basis of facts that had nothing to do with the decision!

In the second part of his Reply Brief, petitioner repeats what he has said many times before, namely, that the sole purpose of the Regulation in question is to require accrual method ranchers to capitalize the costs of raising breeding animals, petitioner's implication being that there should certainly be no objection to a Regulation requiring that such costs be capitalized. The petitioner points out that this capitalizing of raising costs is accomplished by a

> "two-step procedure: (1) The taxpayer deducts all of his expenses; (2) the taxpayer then adds

to income an estimate of the costs of raising his breeding animals. **This has the effect of reducing his deductible expenses by the amount of the costs attributable to raising the breeding animals."** [Emphasis added.]

Petitioner has indeed correctly described exactly how the Commissioner permits a deduction of raising costs with one hand, and immediately takes the deduction away with the other! **The result, of course, is that the farmer gets no deduction for his raising costs, despite the fact that the right to deduct the costs of raising breeding animals has been specifically granted by the Regulations for the last 44 years!**

Finally, no court has ever accepted Regulation 1.471-6(g), which is the regulation requiring that raised breeding animals be included in inventory, as binding unless the taxpayer had an opportunity to avoid its impact by having a meaningful choice as to accounting methods and methods of valuing inventories.

Respectfully submitted,

CLAIBORNE B. GREGORY

ELWOOD CLUCK
Attorneys

October 19, 1965

CERTIFICATE OF SERVICE

It is hereby certified that service of this Answer has been made on opposing counsel by depositing five (5) copies thereof in the United States Mail (Air Mail) with postage prepaid, addressed to THURGOOD MARSHALL, Solicitor General of the United States, Department of Justice, Washington, D.C., 20530, and by depositing one (1) copy thereof in the United States Mail with postage prepaid, properly addressed to ERNEST MORGAN, United States Attorney for the Western District of Texas, Federal Bldg., San Antonio, Texas, on this the 21st day of October 1965.

Elwood Cluck

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